Supreme Court, U. S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALEDA PAYNE,

Petitioner,

versus

JOHN W. WEINSTOCK,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Florida

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was Petitioner deprived of due process of law, guaranteed by the *Constitution of the United States,* by being refused her right to be heard?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

ALEDA PAYNE,

Petitioner,

versus

JOHN W. WEINSTOCK,

Respondent.

On Petition for Writ of Certiorari to
The Supreme Court of Florida

PETITION FOR CERTIORARI

Petitioner, ALEDA PAYNE, prays a Writ of Certiorari issue to review the Order of the Florida Supreme Court, entered on the 19th day of August, 1980, denying Petition for Writ of Certiorari addressed to that Court.

OPINIONS BELOW

The Order of the Florida Supreme Court denying Certiorari is set out verbatim in the Appendix hereto at

pages 6a-7a. The Order of the Second District Court of Appeal and Order denying rehearing are set out verbatim in the Appendix hereto ate pages 4a-5a and 5a, respectively. The Order entered by the Trial Court granting Respondent's Motion to Dismiss is set out verbatim in the Appendix at pages 1a-2a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to *Rule 17(1)(b)* and *17(1)(c), Rules of the Supreme Court of the United States,* and *28 U.S.C. 1257(3),* Petitioner having been deprived of her due process rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The *Constitution of the United States, Amendment XIV,* provides:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE

Petitioner, ALEDA PAYNE, brought a Complaint in the Circuit Court in Sarasota County, Florida, seeking a declaration of her common law marriage to Respondent, JOHN W. WEINSTOCK, and a declaration as to

her rights under the said common law marriage. The action was filed on the 13th day of March, 1977.

After the Respondent filed his Answer to the Petition on July 15, 1977, no activity thereafter appeared of record in the cause until Petitioner filed her Notice to Produce on or about December 24, 1977. (Pg. 7a-9a) Thereafter, on March 17, 1978, Petitioner's attorney filed a Motion for leave to withdraw as attorney of record. (Pg. 9a-11a) Said Motion was granted by Order of the Trial Court dated April 13, 1978. (Pg. 2a-3a)

Subsequently, on January 31, 1979, Petitioner filed her Notice of Hearing (Pg. 11a-12a) seeking to compel Respondent's compliance with the Notice to Produce previously filed.

Five days thereafter, on February 5, 1979, Respondent filed his Motion to Dismiss for Failure to Prosecute (Pg. 13a-14a) ostensibly grounded upon *Rule 1.420(e), Florida Rules of Civil Procedure,* urging that Petitioner had taken no active measure intended and calculated to hasten suit to judgment for the previous year. *Rule 1.420(e)* provides as follows:

> "(e) *Failure to Prosecute.* All actions in which it appears on the face of the record that *no activity* by way of *filing of pleadings, order of court* or otherwise has occurred for a period of one year shall be dismissed by the court on its own motion or on motion of any interested per-

> son, . . . Mere inaction for a period of less than one year shall not be sufficient cause for dismissal for failure to prosecute." (Emphasis supplied)

Notwithstanding that all of the above described activity transpired in the cause within the preceding year, by Order entered on March 30, 1979, the Trial Court granted Respondent's Motion to Dismiss for want of prosecution. (Pg. 1a-2a)

Notice of Appeal was seasonably taken to the District Court of Appeal, Second District of Florida. On Appeal, Petitioner urged that the Trial Court had erred in granting Respondent's Motion to Dismiss and that said action by the Court constituted a flagrant abuse of discretion and misapplication of *Florida Civil Rule 1.420(e)*, and the pertinent case law interpreting said Rule. Nevertheless, the per curiam Order of the Court of Appeal dated January 9, 1980, affirmed the Order of the Trial Court. (Pg. 4a-5a) Petition for Rehearing (Pg. 15a-17a) alleging denial of Petitioner's fundamental right of access to the Courts was denied by Order dated February 15, 1980. (Pg. 5a)

Certiorari proceedings were seasonably brought in the Florida Supreme Court, culminating in an Order dated August 19, 1980, denying the Writ. (Pg. 6a-7a)

WHY WRIT SHOULD ISSUE

The action of the Trial Court below, summarily dismissing Petitioner's Complaint, constituted an egregious disregard for Petitioner's fundamental right of access to the Courts and manifestly violated the due process requirements of fairness and protection from arbitrary governmental action incident to Court proceedings. The Court's arbitrary dismissal of this cause effectively closed the doors of the Courts to Petitioner, and thereby deprived her of her right to a remedy for her cause of action.

"Reasonable access to the courts is a constitutional imperative." *Hooks v. Wainwright,* 352 F.Supp. 163, 166 (Middle District Florida 1972)

> "Access to the courts of the United States is a constitutional right guaranteed by the due process clauses of the *Fifth* and *Fourteenth Amendments* . . . This right of access to the courts *cannot be infringed upon or burdened." Silver v. Cormier,* 529 F.2d 161, 163 (10th CCA 1976) (Citations omitted) (Emphasis supplied)

In the seasoned case of *Brinkerhoff-Faris Trust and Savings Company v. Hill,* 271 U.S. 673, 74 L.Ed. 1107 (1930), this Court aptly addressed generally the issue of one's right to access to the Courts in relation to wrongful dismissal as follows:

> "The federal guarantee of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government . . . (W)hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was afforded to him some real opportunity to protect it."

More recently, this Court has reiterated its approbation of the maintenance of this fundamental constitutional right of access to the Courts and has noted its special significance in matrimonial matters, such as those existing in the case sub judice. *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971).

Petitioner readily concedes that, in determining in what manner a court may effect or alter a fundamental right without a due process violation, no clear line can be drawn which unerringly delineates that which is acceptable and that which is unacceptable. However, all Courts are guided by the fundamental principal, which is the veritable substratem of due process, that:

> "(d)ue process, in simple terms, means fair procedure." *Poe v. Charlotte Memorial Hospital,* 374 F.Supp. 1301 (Western District North Carolina 1974).

In considering the amorphous concept of fairness and due process and what "process" is "due", the Courts cannot implement an arbitrary, inflexible perfunctory-type approach, in complete disregard for the idosyncrasies of the particular case.

> "(D)ue process is flexible and calls for such procedural protection as the particular situation demands." *Morrissey v. Brewer,* 48 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972).
>
> "The test of whether or not one has been afforded procedural due process is one of fundamental fairness in light of the *total circumstances." Buttny v. Smiley,* 281 F.Supp. 280, 288 (D. Colorado 1968) (Emphasis supplied)

Reference to the "total circumstances" in the cause at bar readily reveals that this is not simply a case where the Complaint was filed and then negligently forgotten. The Motion to Withdraw as counsel filed by Petitioner's original attorney on March 17, 1978 (Pg. 9a-11a) clearly discloses that prosecution of the case was not proceeding in an orderly fashion, due largely to differences in opinions between Petitioner and her attorneys. The Court apparently ignored the addition-

al "circumstance" that, subsequent to Petitioner's filing of her Notice to Produce, the "ball was in the Respondent's court." In light of these "total circumstances" it can, under no interpretation of the facts, be seriously contended that the Trial Court's action constituted anything other than an arbitrary sanction against Petitioner for matters beyond her control, and an unearned reward to Respondent for his lack of diligence in responding to Petitioner's Notice to Produce.

Petitioner concedes that the State has some identifiable interest in maintaining a reasonable workload for its Courts and in keeping its Court system effective and efficient. However, "(p)rocedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interest of the person . . ." *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1971). A cursory review of this Court's decisions reveals that the important fundamental rights of the individual do not take a back seat to concerns for expediting the judicial process.

> "The establishment of prompt efficacious proceedings to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed one might fairly say of the Bill of Rights in general and the due process clause in particular, that they were designed to protect the fragile values of a vulnerable

citizenry from the overbearing concern for efficiency and efficacy . . ." *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972)

CONCLUSION

"The due process clause of the *Fifth Amendment* limits the power of the courts to dismiss an action without affording a party the opportunity for a hearing on the merits of the cause." *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (1976). The action of the Trial Court in arbitrarily and peremptorily dismissing Petitioner's cause violated a multiplicity of the most fundamental and basic protections provided to an individual by the due process clause of the *United States Constitution*. The Court's utter disregard for the mandates of the applicable law constituted judicial usurpation in the worst sense. "The substantive content of the due process clause which goes beyond the specific provisions of the Bill of Rights embodies a conception of fundamental justice." *Sotto v. Wainwright*, 601 F.2d 181, 190 (5th CCA 1979). "Fundamental justice" is patently lacking in the case at bar. Its absence deprived Petitioner of her organic right to due process of law and, as a necessary concomitant, this Petition for a Writ of Certiorari to the Supreme Court of Florida should be granted.

Respectfully submitted,

ROBERT E. PYLE, P.A.

ROBERT E. PYLE
Post Office Box 557
Lake Alfred, Florida 33850
Telephone: (813) 956-1852

Attorney of Record for
Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida have been mailed, postage prepaid, to G. Craig Soria, 1734 Main Street, Sarasota, Florida 33577.

I further certify that all parties required to be served have been served.

This ____ day of October, 1980.

ROBERT E. PYLE

APPENDIX

IN THE CIRCUIT COURT,
IN AND FOR SARASOTA COUNTY,
STATE OF FLORIDA

ALEDA PAYNE,
Plaintiff,

versus No. 77-798-CA-01

JOHN W. WEINSTOCK,
Defendant.

ORDER

The case coming on for hearing and the Court having heard arguments of counsel and being fully advised in the premises; it is

ORDERED AND ADJUDGED that:

1. Defendant's Motion to Dismiss For Failure To Prosecute is granted, the Court finding that there has been no active measures taken by the plaintiff within the last 12 months intended and calculated to hasten this case to judgment.

2. Therefore said case is hereby dismissed.

DONE AND ORDERED in Chambers at Sarasota, Florida this 28th day of March, 1979.

/s/ GRISSIM H. WALKER
GRISSIM H. WALKER,
CIRCUIT JUDGE

GHW/psm

Copies to:

John M. Strickland, Esquire

Michael E. Sweeting, Esquire

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR SARASOTA COUNTY

CIVIL ACTION

(Number and Title Omitted)

ORDER ON MOTION TO WITHDRAW AS ATTORNEY OF RECORD

THIS CAUSE, having come on to be heard upon the Motion of the law firm of Crabtree, Butler, Syprett &

Meshad, P.A., to be relieved as counsel of record for the Plaintiff, and the Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that the Motion to Withdraw as Attorney of Record is hereby granted and the law firm of Crabtree, Butler, Syprett & Meshad, P.A., is hereby relieved as attorney of record for the Plaintiff in this action.

DONE AND ORDERED in Chambers in Sarasota County, Florida this 12th day of April, 1978.

/s/ EVELYN GOBBIE
EVELYN GOBBIE
Judge, Circuit Court

Copies furnished to:

G. Craig Soria, Esquire
M. Joseph Lieb, Jr., Esquire
Aleda Payne

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED.

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ALEDA PAYNE,

Appellant,

versus Case No. 79-728

JOHN W. WEINSTOCK,

Appellee.

Opinion filed January 9, 1980.

Appeal from the Circuit Court for Sarasota County; Grissim H. Walker, Judge.

Robert E. Pyle, Lake Alfred, for Appellant.

G. Craig Soria, Sarasota, for Appellee.

PER CURIAM:

Affirmed.

GRIMES, C.J., SCHEB and DANAHY, JJ., Concur.

IN THE
SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

FEBRUARY 15, 1980

(Number and Title Omitted)

The attorney for appellant having filed a Petition for Rehearing in the above-styled cause, upon consideration, it is

ORDERED that said Petition is hereby denied.

A TRUE COPY
TEST:

/s/ WILLIAM A. HADDAD
CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: Robert E. Pyle, Esq.
G. Craig Soria, Esq.

SUPREME COURT OF FLORIDA

TUESDAY, AUGUST 19, 1980

ALEDA PAYNE,

Petitioner,

versus Case No. 58,852

JOHN W. WEINSTOCK,

Respondent.

District Court of Appeal, 2d District
No. 79-728

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON, ALDERMAN, and McDONALD, JJ., concur.

cc: Hon. William A. Haddad, Clerk
Hon R. H. Hackney, Jr., Clerk
Hon. Grissim H. Walker, Judge

Robert E. Pyle, Esquire
G. Craig Soria, Esquire

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court.

/s/ Phyllis Bambury
Deputy Clerk

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR SARASOTA COUNTY

CIVIL ACTION

ALEDA PAYNE,

Plaintiff,

versus No. 77-798 CA-01

JOHN W. WEINSTOCK,

Defendant.

NOTICE TO PRODUCE

TO: JOHN W. WEINSTOCK, Defendant
c/o His Attorney
G. CRAIG SORIA, ESQUIRE
1520 South Tamiami Trail
Sarasota, Florida 33579

YOU ARE HEREBY NOTIFIED to produce the following items for inspection and/or duplicating, on Friday, February 3, 1978, at 10:00 A.M., at the law offices of CRABTREE, BUTLER, SYPRETT, & MESHAD, P.A., 100 South Washington Boulevard, Sarasota, Florida:

1. Any and all envelopes or letters upon which the name "Mrs. Aleda Weinstock" appears.

2. Copies of any and all insurance policies owned by you subsequent to 1939.

3. Any and all papers, documents, instruments, etc., upon which the name "Mrs. Aleda Weinstock" appears.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to JOHN W. WEINSTOCK, Defendant, c/o his attorney, G. CRAIG SORIA, ESQUIRE, 1520 South Tamiami Trail, Sara-

sota, Florida 33579, this the 22nd day of December, 1977.

CRABTREE, BUTLER, SYPRETT
& MESHAD, P.A.
100 South Washington Boulevard
Sarasota, Florida 33577

GRANVILLE H. CRABTREE, JR.
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR SARASOTA COUNTY

CIVIL ACTION

(Number and Title Omitted)

MOTION TO WITHDRAW AS
ATTORNEY OF RECORD

COMES NOW, the law firm of CRABTREE, BUTLER, SYPRETT & MESHAD, P.A., who are counsel of record on behalf of the Plaintiff, ALEDA PAYNE, and

files this its Motion to withdraw as attorney of record, and advises the Court that the action has not been set for trial, that notice of this law firm's motion to withdraw as attorney of record has been given to the Plaintiff, that ample time remains for the Plaintiff to procure new counsel, and that no circumstances in this case would work to cause any unusual hardship on the Plaintiff, and as grounds would state:

1. That the Plaintiff and this law firm have a dispute as to the manner as to how this lawsuit should be conducted, and that such dispute appears to be irreconcilable after several attempts were made to do so by way of personal conferences.

2. That as a result of the irreconcilable dispute, it is felt best that the Plaintiff seek counsel of her choice that will represent the view point that she holds in this litigation.

3. The Plaintiff, by her conduct, has made it unreasonably difficult for this law firm to represent her.

WHEREFORE, the undersigned attorney prays:

1. That this Honorable Court will immediately enter an Order relieving the law firm of CRABTREE, BUTLER, SYPRETT & MESHAD, P.A., of any and all responsibility in this case, and further directing to whom said file should be relinquished.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to G. CRAIG SORIA, ESQUIRE, 1520 South Tamiami Trail, Sarasota, Florida, 33579, this the 16th day of March, 1978.

CRABTREE, BUTLER, SYPRETT
& MESHAD, P.A.
100 South Washington Boulevard
Sarasota, Florida 33577

/s/ M. JOSEPH LIEB, JR.
M. JOSEPH LIEB, JR.
Attorney for Plaintiff

IN THE CIRCUIT COURT IN AND FOR
SARASOTA COUNTY, FLORIDA

(Number and Title Omitted)

NOTICE OF HEARING

TO: G. CRAIG SORIA
Attorney for Defendant
McShirley, Soria and Hutchens, P.A.
1734 Main Street
Sarasota, Florida 33577

YOU ARE HEREBY NOTIFIED that the undersigned has set down for hearing before the Honorable Grissim H. Walker, one of the Judges of the above-styled Court, in chambers located at Sarasota County Courthouse, Sarasota, Florida, at 3:15 P.M. on the 2nd day of February, 1979 (Friday), or as soon thereafter as counsel may be heard on Motion to Compel Notice to Produce. Time Reserved: 15 minutes.

DATED this 26th day of January, 1979.

I HEREBY CERTIFY that a copy of the foregoing Notice of Hearing was served upon the above-named addressee by mail/delivery this 26th day of January, 1979.

/s/ JOHN M. STRICKLAND
JOHN M. STRICKLAND
Attorney at Law
2828 South Tamiami Trail
Sarasota, Florida 33579
Phone: (813) 365-2827
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR SARASOTA COUNTY, FLORIDA

(Number and Title Omitted)

MOTION TO DISMISS
FOR FAILURE TO PROSECUTE

COMES NOW the Defendant, JOHN W. WEINSTOCK, by and through his undersigned attorney in the above-styled cause, and moves for an Order dismissing this action, and for grounds therefor, would state that the Plaintiff has not taken any active measure intended and calculated to hasten this suit to judgment within the last twelve (12) months.

LEE AND SURFUS, P.A.

/s/ MICHAEL E. SWEETING
MICHAEL E. SWEETING
2072 Ringling Boulevard
Sarasota, Florida 33577
Telephone: (813) 366-1990
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to JOHN M. STRICKLAND, ESQUIRE, Attorney for Plaintiff, 2828 South Tamiami Trail, Sarascta, Florida 33579, this the 2nd day of February, 1979.

LEE AND SURFUS, P.A.

/s/ MICHAEL E. SWEETING
MICHAEL E. SWEETING
2072 Ringling Boulevard
Sarasota, Florida 33577
Telephone: (813) 366-1990
Attorney for Defendant

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

ALEDA PAYNE,

Appellant,

versus Case No. 79-728

JOHN W. WEINSTOCK,

Appellee.

PETITION FOR REHEARING

COMES NOW the Appellant, ALEDA PAYNE, by and through her undersigned attorney, and respectfully petitions this Honorable Court for rehearing in the above entitled cause, and as grounds therefor, says:

1. That this Court has failed to give effect to the pronouncements of the Fourth District in *Popkin v. Crispen*, 213 So.2d 445 (4DCA 1968), wherein that Court said:

> "We feel that judicial restraint should be practiced in the courts' inherent power to dismiss actions for want of prosecution to the end that *persons have the guarantee and privilege of having the merits of his cause adjudicated.*" (Emphasis supplied)

The net effect of the Order of this Court is to exalt form over substance, thereby denying Plaintiff/Appellant access to the Court and frustrating the determination of the cause on its merits.

2. That especially in the light of the pronouncements of the Third District in *Phillips Petroleum Company v. Heimer*, 339 So.2d 284 (3DCA 1976), it cannot be gainsaid that Plaintiff failed to take any active measure intended and calculated to hasten the suit to judgment within the preceeding twelve months. The *Phillips Petroleum Company* case specifically says that anything more than a mere passive effort is sufficient to avoid dismissal for failure to prosecute! Undeniably, Plaintiff's actions were more than a mere passive effort.

This Court apparently based its actions upon the chronology of Plaintiff's actions, which were described by Appellee as "being well-established" that one does not obtain and send to opposing counsel hearing time on motions not yet filed. We must agree, it is unorthodox to reverse the procedure, but not unheard of! The fact that the action was unorthodox does not render it a sham or mere passive effort, neither does it warrant the conclusion that such effort was not intended or calculated to hasten the suit to judgment!

3. The action of this Tribunal in affirming the Order of the Trial Court visits an unwarranted and unduly harsh result upon Plaintiff/Appellant, which operates to deprive her of her organic right of access to the

courts, thereby foreclosing the opportunity for her to have the issues resolved on their merits. Moreover, the effect of the Order affirming the Trial Court is to reward the Defendant for his dilatory conduct in failing to respond to the Notice to Produce previously filed by Plaintiff/Appellant and encourages similar evasive and dilatory conduct on the part of litigants.

WHEREFORE, Appellant respectfully moves this Honorable Court for rehearing in the above entitled cause, and for the reasons hereinabove expressed, to thereupon reverse the Order of the Trial Court dismissing the subject cause, with appropriate instructions.

/s/ ROBERT E. PYLE
ROBERT E. PYLE
Post Office Box 557
Lake Alfred, Florida 33850
Telephone: (813) 956-1852

Attorney for Appellant